

1 Honorable Benjamin H. Settle
2 Honorable J. Richard Creatura
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8 UNITED STATES DISTRICT COURT
9 WESTERN DISTRICT OF WASHINGTON
AT TACOMA

10 DARRICK L. HUNTER,
11 Plaintiff,
12 v.
13 CHARLES N. ROHRER, SERGEANT;
14 AND TIMOTHY J. McCANDLESS,
15 SERGEANT; AND MARGARET
16 GILBERT, SUPERINTENDENT FOR THE
17 WASHINGTON STATE DEPARTMENT
OF CORRECTIONS IN THEIR
INDIVIDUAL AND OFFICIAL
CAPACITIES;
18 Defendants.

Case No. C18-5198-BHS-JRC

PLAINTIFF'S OPPOSITION TO
DEFENDANTS' MOTION FOR
SUMMARY JUDGMENT

NOTED ON MOTION CALENDAR:

March 19, 2021

19 **I. INTRODUCTION**

20 Plaintiff Darrick Hunter worked on a custodial crew at the Stafford Creek Corrections
21 Center (“SCCC”) that cleaned extended visitation housing units (“EFVs”) in a secured area of
22 the prison known as the HUB. Hunter and the other inmates that cleaned the EFVs were all
23 Black; when Hunter started in February 2015, they were the only all-Black crew working in the
24 HUB. Although WSDOC’s own records confirm other maintenance crews had more frequent
25 access to the EFVs, defendant Charles Rohrer singled out the all-Black custodial crew alone for
26 routine strip searches and the evidence suggests he did so because of racial animus. The

PLAINTIFF'S OPPOSITION TO DEFENDANTS' MOTION FOR
SUMMARY JUDGMENT - 1

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1 evidence also suggests that Rohrer and his colleague defendant McCandless singled out Hunter
 2 for further disparate treatment because of his race, such as falsely accusing him of rule violations
 3 and trying to get him suspended from his job. Another supervisor working in the HUB described
 4 Rohrer and McCandless as part of the “white supremacy set.” Esler Decl., Ex. 1 (Baldwin Dep.
 5 at 24:18 – 25:10, 26:11 – 27:15, 29:5-25, 35:10-12, 16-21). Rohrer told Hunter directly that
 6 Rohrer did not want Hunter’s “Black ass” working in the HUB. Hunter Decl., ¶ 27.

7 Defendants argue that the Court should not consider the merits of Hunter’s claims (other
 8 than those arising from the strip searches) because Hunter allegedly failed to exhaust his
 9 administrative remedies. It is defendants’ burden to prove exhaustion, defendants have failed to
 10 do so, and the Court should dismiss that affirmative defense now pursuant to Fed. R. Civ. P.
 11 56(f). *Albino v. Baca*, 747 F.3d 1162, 1176-1177 (9th Cir. 2014)(en banc). Hunter filed a
 12 grievance against defendants Rohrer and McCandless in January 2016 (Dkt. 77, at 110), and
 13 continued to lodge grievances for later incidents that he believed demonstrated racial bias (and
 14 Rohrer’s retaliation against Hunter for filing grievances). Dkt. 77, at 118, 139. Hunter also sent
 15 a letter directly to Superintendent Gilbert about his claims. Esler Decl., Ex. 8 (Gilbert Dep.,
 16 Ex. 13). Superintendent Gilbert informed Hunter that she would be investigating his claims
 17 further. Dkt. 76, Ex. 3, at 110, Esler Decl., Ex. 9 (DEFS 000307). Hunter’s grievances provided
 18 sufficient information to understand he was complaining that Rohrer and McCandless were
 19 treating Black inmates in the HUB (and Hunter in particular) differently because of race, which
 20 is sufficient. *Griffin v. Arpaio*, 557 F.3d 1117, 1120 (9th Cir. 2009).

21 Per SCCC’s grievance policy, Hunter’s grievances about employee conduct had to be
 22 dealt with by the superintendent’s office (Dkt. 77, at 21, 55), so it was in Gilbert’s hands to
 23 investigate. Hunter inquired numerous times to the grievance coordinator (officer Dahne) about
 24 the status of Gilbert’s investigation, and was told repeatedly that he (Hunter) had done all that he
 25 needed to do. Esler Decl., Ex. 2 (Hunter Dep. at 157:9–159:3). Hunter also attempted to contact
 26 Gilbert to inquire about the status of the investigation, but Gilbert failed to respond. Esler Decl.,

1 Ex. 2 (Hunter Dep. at 158:8–159:23). Gilbert’s team never provided their findings to Hunter; he
 2 did not receive them until produced in discovery. Esler Decl., Ex. 2 (Hunter Dep. at 158:8–
 3 161:10). When prison officials do not respond to a grievance, administrative remedies are
 4 effectively unavailable and exhausted. *Dole v. Chandler*, 438 F.3d 804, 809, 811 (7th Cir. 2006);
 5 *accord Sapp v. Kimbrell*, 623 F.3d 813, 822-823 (9th Cir. 2010) (approving of *Dole*’s holding).

6 Finally, the officers involved do not have qualified immunity to engage in racial
 7 discrimination. Hunter adequately exhausted his administrative remedies; there are sufficient
 8 questions of fact regarding Hunter’s claims against Rohrer and McCandless¹ to go to the jury.

9 **II. STATEMENT OF FACTS**

10 **A. HUNTER WAS AMONG THE FIRST BLACK INMATES TO WORK IN THE 11 HUB.**

12 Hunter was hired into the Washington State Department of Corrections (“DOC”) work
 13 training program at SCCC on February 23, 2015. Declaration of Darrick L. Hunter (“Hunter
 14 Decl.”) ¶ 3. Hunter was assigned to SCCC’s Facility Maintenance as a Custodial porter, and
 15 Mark Sherwood (“Sherwood”) was his manager. *Id.* Hunter worked as a Custodial porter from
 16 February 23, 2015 – January 29, 2016, and then again from April 20, 2016 – November 22,
 17 2016. Hunter Decl., ¶ 3.

18 The custodial shop, along with other facility maintenance positions, were located in a
 19 secured area of SCCC known as the HUB. *Id.* at ¶ 3. To enter or exit the HUB, inmates would
 20 go through a metal detector and were searched. Esler Decl., Ex. 3 (Sherwood Dep. at 32:6-19).
 21 To work in the HUB at all, inmates had to be free of major infractions. Esler Decl., Ex. 3
 22 (Sherwood Dep. at 44:21-25).

23 Hunter was part of a custodial crew responsible for cleaning SCCC’s Extended Family
 24 Visitation Housing Units (“EFVs”) located in the HUB. Hunter Decl., at ¶ 6. SCCC used the
 25 EFVs as quarters for inmates to participate in family visits. Dkt. 29 at 2-3. SCCC policies

26 ¹ Hunter has separately agreed to dismiss defendant Gilbert. Dkt. No. 81.

1 insured both inmates and family members participating in these visits were subject to strict
 2 security measures. Dkt. 73, at 2; Declaration of Eugene Tremble (“Tremble Decl.”) at ¶ 7;
 3 Declaration of Jasper Harris (“Harris Decl.”) at ¶ 9. Corrections officers thoroughly searched the
 4 EFV units for contraband before any inmate workers (known as “porters”) entered the EFV
 5 Units. Esler Decl., Ex. 3 (Sherwood Dep. at 121:24–123:1); Dkt. 73, at 2. Many other
 6 correctional industries crews also worked in the HUB, such as HVAC, electrical, bike, carpentry,
 7 lawn and garden, paint, construction maintenance, metal, and plumbing, among others. Hunter
 8 Decl. at ¶ 4.

9 On about July 16, 2014, Mark Sherwood took over the custodial supervisor position in
 10 the HUB. Esler Decl., Ex. 3 (Sherwood Dep. at 68:23); Esler Decl., Ex. 10 (Sherwood Dep.,
 11 Ex 3). When Sherwood took that position, there were no Black workers working in the HUB.
 12 Esler Decl., Ex. 3 (Sherwood Dep. at 145:19 – 146:4); Esler Decl., Ex. 10 (Sherwood Dep.,
 13 Ex. 3). Sherwood hired the first Black worker in the HUB area shortly after he became
 14 supervisor; indeed, he hired mostly Black workers during his tenure as custodial supervisor.
 15 Esler Decl., Ex. 3 (Sherwood Dep. at 34:22 – 35:15, 37:8-11, 145:19 – 146:4).

16 In about October 2014, after Sherwood hired yet another Black worker, defendant
 17 McCandless asked Sherwood “why are you hiring all these Blacks?” Esler Decl., Ex. 3
 18 (Sherwood Dep. at 54:19-25, 56:23 – 57:21); Esler Decl., Ex. 10 (Sherwood Dep., Ex. 3).
 19 Rohrer made similar statements to Sherwood. Esler Decl., Ex. 3 (Sherwood Dep. at 57:25 –
 20 59:12; Esler Decl., Ex. 10 (Sherwood Dep., Ex. 3). Rohrer and McCandless started referring to
 21 Sherwood and his shop as “Sher-hood” because Sherwood hired Black workers. Esler Decl.,
 22 Ex. 3 (Sherwood Dep. at 76:17 – 25); Tremble Decl., ¶ 13. Throughout Sherwood’s tenure as
 23 custodial supervisor, his custodial crew was the only crew in the HUB that had Black inmates
 24 working in it. Esler Decl., Ex. 3 (Sherwood Dep. at 145:19 – 146:4).

25 Secretary Gilbert raised concerns with SCCC supervisors regarding the racial makeup of
 26 the offenders working in the HUB area after inmates sent complaints to Gilbert and to Olympia

1 calling attention to the fact that Black inmates were unable to get jobs with HUB access. Esler
 2 Decl., Ex. 4 (Gilbert Dep. at 30:12–31:13); Esler Decl., Ex. 2 (Hunter Dep. at 52:7–53:1). Ed
 3 Baldwin, who was another supervisor in the HUB, described Rohrer and McCandless as part of
 4 the “white supremacy set.” Esler Decl., Ex. 1 (Baldwin Dep. at 24:18 – 25:2, 26:11 – 27:15,
 5 28:13 – 29:20, 35:10 – 36:6).

6 **B. AFTER SHERWOOD STARTED HIRING BLACK INMATES, ROHRER
 7 ORDERED CONSTANT STRIP SEARCHES OF SHERWOOD’S CREW.**

8 The State claims that sometime “in 2014” it received information that drugs were
 9 entering the SCC through the EFV units via an offender on the custodial crew. Dkt. 29, ¶ 6.
 10 However, the available evidence suggests that these incidents occurred before Mark Sherwood
 11 became supervisor in July 2014. Dkt. 29; Dkt. 31, ¶ 4; Esler Decl., Ex. 11 (DEFS 001208-DEFS
 12 001209). Sherwood’s custodial crew members had nothing to do with the breaches of security
 13 and smuggling of contraband. Esler Decl., Ex. 3 (Sherwood Dep. at 35:19–37:20); Esler Decl.,
 14 Ex. 5 (Rohrer Dep. at 184:21-185:4). By October 15, 2014, Sherwood had hired about three
 15 Black inmates to work on his custodial crew. Esler Decl., Ex. 10 (Sherwood Dep. Ex. 3);
 16 Tremble Decl., ¶ 4. Shortly after, defendant McCandless asked Sherwood why he was hiring all
 17 these Black guys. Esler Decl., Ex. 10 (Sherwood Dep., Ex. 3). One of the crew members
 18 (Eugene Tremble, who is Black) noticed Rohrer and McCandless watching them in a different
 19 way, as if Rohrer and McCandless were looking to find things wrong. Tremble Decl., ¶ 6.

20 On November 4, 2014, Chris Idso (“Idso”) sent an email to McCandless and Rohrer
 21 informing them “it is the expectation that offenders working in the EFV’s in a semi supervised
 22 capacity will be strip searched when they are done. Semi-supervised means any offender that
 23 leaves the direct line of site [sic] of his/her supervisor. Under this definition, it will always mean
 24 the porter crews.” Hunter Decl. at ¶ 10, Ex. 3. “Porter crews” at SCCC refers to *all* facility
 25 maintenance crews, not just Sherwood’s custodial cleaning crew. Hunter Decl. at ¶ 13; *see also*
 26 Esler Decl., Ex. 3 (Sherwood Dep. at 87:12-14; 115:24 – 116:17 (other maintenance crews were

1 also “porters”). There are “porters” on the custodial crew, mechanical crew, construction crew,
 2 etc. Hunter Decl., at ¶ 13. Indeed, Idso’s email refers to “crews” – plural – not a particular
 3 “crew.” Idso was ordering strip searches of *any* crew member who worked in the EFV Units and
 4 left the direct line of sight of a supervisor, not strip searches of just the all-Black custodial crew.

5 Rather than implement that policy to apply to all inmate crews working in the EFVs
 6 regardless of race, Rohrer instead sent out an email that day inaccurately ordering that only
 7 “EFV cleaning crews . . . be searched before leaving the EFV Unit being cleaned.” Hunter
 8 Decl., ¶ 14, Ex. 4; *see also* Esler Decl., Ex. 4 (Gilbert Dep. at 66:12 – 67:24); Ex. 12 (Rohrer
 9 email implementing policy). By doing so, Rohrer singled out Sherwood’s all-Black crew alone
 10 for regular and consistent strip searches. Esler Decl., Ex. 5 (Rohrer Dep. at 189:15–22). An
 11 officer conducting a strip search on Hunter told Hunter directly that Rohrer issued the directive
 12 to strip search the custodial crew. Hunter Decl., ¶ 8. SCCC’s own investigation confirmed that
 13 the all-Black custodial crew was the “only crew that were getting stripped searched each time
 14 they go into the EFVs.” Esler Decl., Ex. 13 (Gilbert Dep., Ex. 17), at 2.

15 Sherwood hired plaintiff Hunter for his custodial crew around February 23, 2015. During
 16 the time Hunter worked on the custodial crew, all of Sherwood’s custodial crew members were
 17 Black except for one Caucasian crew member who did not work alongside the rest of the crew
 18 and never cleaned the EFVs.² Hunter Decl. at ¶ 6; Esler Decl., Ex. 2 (Hunter Dep. at 52:7–16,
 19 53:16–21); Jasper Decl., ¶ 4; Tremble Decl., ¶ 4. There were many other work training shops
 20 offered by SCC in the HUB area, but these crews consisted of mostly Caucasian and non-Black
 21 offenders, which Rohrer and McCandless seemed to prefer. Esler Decl., Ex. 2 (Hunter Dep. at
 22 52:7–54:22); Tremble Decl. at ¶ 7; Harris Decl. at ¶ 9; Esler Decl., Ex. 3 (Sherwood Dep. at
 23 144:18 – 146:12); Esler Decl., Ex. 1 (Baldwin Dep. at 6:23 – 7:23, 10:11-13, 22-24; 12:15-25).

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² Sherwood’s custodial crew had one white inmate worker for a while (David DeSpain), but that white inmate never
 26 worked cleaning the EFV units. Hunter Decl., ¶ 6; Esler Decl., Ex. 3 (Sherwood Dep. at 36:15 – 23, 37:8-11, 112:23
 – 113:14) (confirming that DeSpain never worked in the EFVs).

1 Sherwood's custodial crew was the only porter crew that consisted of all-Black inmates. Hunter
 2 Decl., ¶ 6; Tremble Decl., ¶¶ 4, 7. As confirmed by one of the HUB supervisors, "the majority
 3 of the workers in the HUB are white." Esler Decl., Ex. 1 (Baldwin Dep. at 18:25 – 19:1).

4 On about March 20, 2015, Hunter witnessed Sherwood walk into the custodial shop
 5 visibly upset and agitated. Hunter Decl. at ¶ 9. While Sherwood was on the phone, Hunter
 6 overheard him say that he was approached by Rohrer and McCandless, who had asked him again
 7 "why are you hiring all these Blacks on your crew?" Hunter Decl. at ¶ 9; *accord* Esler Decl.,
 8 Ex. 3, (Sherwood Dep. at 54:4 – 55:5, 56:23–58:19) (confirming those statements); Dkt. No. 3,
 9 ¶4.4.³ Additionally, other inmates approached Hunter and informed him that Rohrer did not
 10 want Black offenders working in the HUB. Esler Decl., Ex. 2 (Hunter Dep. at 29:4–11).

11 As the State's own records show, other facility maintenance crews, such as construction
 12 maintenance, entered the EFV Units regularly and *more often* than Sherwood's all-Black
 13 custodial crew, and thus presumably posed the same security risks (as indeed was the conclusion
 14 in Idso's original email instructing that all crews be strip searched). Hunter Decl., ¶¶ 7 – 8,
 15 Ex. 1. Hunter has gone through the State's records, and identified over a dozen instances where
 16 those records confirm that the custodial crew was in the EFVs on the same date as other facility
 17 maintenance crews. Hunter Decl., ¶ 8. Hunter also testifies that he recalls working "in the same
 18 EFV Units at the same time as the other Facility Maintenance porter crews, yet [his] Black
 19 coworkers and [he] were the only inmates strip searched upon exiting the EFV Units" Hunter
 20 Decl., ¶ 8; *see also* ¶¶ 7, 19-20 (explaining the regularity with which other crews would
 21 work in the EFVs, often at the same time as Hunter); Esler Decl., Ex. 10 (Sherwood Dep., Ex. 3).

22 The Black custodial crew "was the only crew that was regularly strip searched even
 23 though many other porter crews were entering and exiting the EFV Units, often at the same
 24 time" as Hunter's custodial crew. Hunter Decl., ¶ 14; Esler Decl., Ex. 2 (Hunter Dep. at 50:8–
 25

26 ³ This is Hunter's handwritten, verified complaint, the facts of which he verified and declared "under the penalty of perjury," which should be sufficient to also render them evidence. 28 U.S.C. § 1746.

1 18); Tremble Decl., ¶ 7. The custodial crew reportedly entered the EFV Units 60 times between
 2 the years of 2014 and 2016, while the construction maintenance crew entered the EFV Units 95
 3 times during that same period. Hunter Decl. at ¶¶ 8, 20–21, Ex. 1.

4 Sherwood's custodial crew members had nothing to do with the breaches of security and
 5 smuggling of contraband, all of which occurred before Sherwood became supervisor in July
 6 2014. Esler Decl., Ex. 3 (Sherwood Dep. at 35:19–37:20); Esler Decl., Ex. 5 (Rohrer Dep. at
 7 184:21–185:4). Hunter and his crew were subject to at least 25 strip searches or more. Hunter
 8 Decl. at ¶¶ 16–17. Notably, Hunter recalls many more strip searches than shown in the State's
 9 records, and the State seems to admit it does not have complete records of the strip searches
 10 actually conducted. Hunter Decl., at ¶¶ 16–17; Esler Decl., Ex. 5 (Rohrer Dep. at 193:23 –
 11 194:6, 207:8 – 14); Esler Decl., Ex. 3 (Sherwood Dep. at 125:22 – 127:10).

12 The Rohrer-implemented strip searches of the custodial crew were not conducted
 13 consistent with DOC Policy 420.310 (attached as Exhibit 5 to the Hunter Declaration). For
 14 example, the strip searches of Hunter and the rest of the custodial crew were improperly carried
 15 out inside the EFV Units for a long period and were not properly recorded. Esler Decl., Ex. 14;
 16 Esler Decl., Ex. 2 (Hunter Dep. at 13:21–15:8). Further, SCCC security staff made Hunter touch
 17 his genitals repeatedly during strip searches. Esler Decl., Ex. 2 (Hunter Dep. at 15:6–19). As a
 18 result, Hunter, Harris, and Tremble complained to Sherwood about how SCCC staff would
 19 engage in inappropriate conduct during these searches, and that the manner in which they were
 20 occurring was making them uncomfortable. *Id.*

21 Hunter and his colleagues (Harris and Tremble) complained that other crews (consisting
 22 mostly of white offenders) in other shops were allowed to work in the EFV Units without being
 23 subjected to a strip search and that they were being treated differently because they were Black.
 24 Tremble Decl., ¶ 7; Harris Decl., ¶ 9. On or about January 20, 2016, Hunter, Harris, and
 25 Tremble told Sherwood that he should not hire any more Black offenders on his crew to prevent
 26 Rohrer and McCandless from harassing other Black offenders. Esler Decl., Ex. 2 (Hunter Dep.

1 at 152:15–153:2). When questioned by McCandless about why he was hiring “all these Black
 2 guys,” Sherwood told him that he was hiring good workers and that it had “nothing to do with
 3 color” for him. Esler Decl., Ex. 3 (Sherwood Dep. at 56:23–57:11). Similarly, Sherwood told
 4 Hunter that he was hiring people who are good workers with good conduct, not because they are
 5 Black. Esler Decl., Ex. 2 (Hunter Dep. at 153:3–6); Esler Decl., Ex. 3 (Sherwood Dep., 56:23 –
 6 57:21).

7 **C. ROHRER’S MISTREATMENT OF HUNTER WENT BEYOND THE STRIP
 8 SEARCHES.**

9 On or about January 20, 2016, Hunter went to lunch and received a lunch box that
 10 contained butter brickle and Sun Chips (which contain peanuts and sunflower oil). Hunter Decl.
 11 at ¶ 24. Hunter told McCandless he could not eat the lunch, as Hunter has a severe food allergy
 12 to peanut and sunflower products. Hunter Decl. at ¶¶ 24–25; Esler Decl., Ex. 2 (Hunter Dep. at
 13 81:15–82:7). Hunter’s health status reports (“HSRs”) on file in DOC’s computer system
 14 indicates that Hunter is to be given a special diet meal. Hunter Decl. at ¶ 24, Ex. 9. Rohrer saw
 15 Hunter discussing his health diet with McCandless, and Rohrer told Hunter that he needed to
 16 provide his HSR to obtain a special diet meal. Hunter Decl. at ¶ 25; Esler Decl., Ex. 2 (Hunter
 17 Dep. at 81:15–82:16). Hunter asked Rohrer to look up his HSR in SCCC’s computer system,
 18 OMNI (which is a very simple process), but Rohrer refused to do so. Hunter Decl. at ¶ 25; Esler
 19 Decl., Ex. 2 (Hunter Dep. at 81:15–82:21); Esler Decl., Ex. 3 (Sherwood Dep. at 94:10–95:16).
 20 Hunter was unable to eat the lunch provided to him that day and simply gave it away. Esler
 21 Decl., Ex. 2 (Hunter Dep. at 81:15–82:21).

22 On or about January 22, 2016, Hunter brought his HSR for the peanut product allergy and
 23 his medical records for his sunflower oil allergy to Rohrer, and Rohrer just laughed at Hunter.
 24 Esler Decl., Ex. 2 (Hunter Dep. at 81:15 – 82:25); Tremble Decl. at ¶ 8. Hunter went back to his
 25 table and was discussing the incident when Rohrer overheard. Hunter Decl. at ¶ 26; Esler Decl.,
 26 Ex. 2 (Hunter Dep. at 81:15–83:22). Rohrer pulled Hunter out into the hallway and began

1 yelling at him, calling him “a liar,” and telling him to “shut up.” Hunter Decl. at ¶ 27; Esler
 2 Decl., Ex. 2 (Hunter Dep. at 81:15–85:10). McCandless witnessed the interaction and just stood
 3 by smiling and laughing at Hunter. Esler Decl., Ex. 2 (Hunter Dep. at 81:15 – 85:10, 100:11-16).

4 Rohrer then told another officer to remove Hunter and told Hunter that he was terminated
 5 from his position in Corrections Industries. Hunter Decl. at ¶ 27; Esler Decl., Ex. 2 (Hunter Dep.
 6 at 81:15 – 85:10). Hunter informed Rohrer that he was going to file a grievance against him and
 7 would be seeking a different job, and Rohrer responded, “I don’t want your Black ass out here
 8 anyway.” Hunter Decl. at ¶ 27; Esler Decl., Ex. 2 (Hunter Dep. at 81:15–85:10; 98:22–99:10);
 9 Harris Decl., ¶ 7. Later that day, Hunter was informed from his crew mates that he would be
 10 returning to work in his normal role because Sherwood confirmed his food allergies. Esler Decl.,
 11 Ex. 2 (Hunter Dep. at 85:18–86:11).

12 **D. ROHRER AND MCCANDLESS CONTINUE TARGETING HUNTER.**

13 On January 26, 2016, Hunter was authorized by Sherwood to be at the back of the kitchen
 14 to deliver chemicals to Diane Krasowski (“Krasowski”), a correctional food service staff
 15 member. Hunter Decl. at ¶ 30; Esler Decl., Ex. 2 (Hunter Dep. at 71:23–72:20); Esler Decl.,
 16 Ex. 6 (Denzer Dep. at 29:2 – 25). This is a delivery the custodial crew makes daily. Esler Decl.,
 17 Ex. 2 (Hunter Dep. at 71:23–72:20). While Hunter was making his delivery per routine, he
 18 asked Krasowski to look into the issues he was having getting his special diet meal. Esler Decl.,
 19 Ex. 2 (Hunter Dep. at 74:22–75:5). Hunter never knocked on Krasowski’s door, he merely
 20 waived at her and asked to talk to her, which she obliged. Hunter Decl. at ¶ 30; Esler Decl.,
 21 Ex. 2 (Hunter Dep. at 70:11–71:16). A corrections officer was present but never told Hunter to
 22 stop talking to Krasowski or to get back “in bounds.” Esler Decl., Ex. 2 (Hunter Dep. at 74:24–
 23 75:13).

24 Soon after this encounter, Rohrer emailed Sherwood and Idso accusing Hunter of trying
 25 to “manipulate staff to get what he wants,” and suspended Hunter claiming that he was a security
 26 issue. Esler Decl., Ex. 2 (Hunter Dep. at 76:15–77:23); Esler Decl., Ex. 15 (DEFS 000739-740);

1 Esler Decl., Ex. 16 (DEFS 001105-1107). Rohrer encouraged the termination of Hunter stating
 2 that “for security concerns he should not be in the hub at all.” Esler Decl., Ex. 2 (Hunter Dep. at
 3 76:15–77:23); Esler Decl., Ex. 17 (DEFS 000692-694). Because there were no records to
 4 support such suspension or termination, the Facility Risk Management Team (“FRMT”)
 5 disagreed, and refused to suspend or terminate Hunter from his job. Esler Decl., Ex. 2 (Hunter
 6 Dep. at 78:8–20); Ex. 6 (Denzer Dep. at 29:2 – 25).

7 During a separate custodial duty on January 26, 2016, Hunter was in the T Building.
 8 Esler Decl., Ex. 2 (Hunter Dep. at 103: 25–105:4); Hunter Decl., ¶ 31, Ex. 13. When he entered
 9 the building, no one was there, so he went looking for someone. Esler Decl., Ex. 2 (Hunter Dep.
 10 at 103:25–105:7). Hunter then saw Marsha McCormick (“McCormick”), the job coordinator,
 11 and asked McCormick about the status of the Correction Industries chair shop (“CI Chair Shop”)
 12 program he was transferring into as a result of the constant harassment he was enduring from
 13 Rohrer. Esler Decl., Ex. 2 (Hunter Dep. at 111:13–112:1); Hunter Decl., ¶ 31. McCormick
 14 asked Hunter to come into her office and looked up the status of the new position to try to help
 15 with the transition to the new role. Esler Decl., Ex. 2 (Hunter Dep. at 106:25–107:15). At no
 16 point was Hunter out of bounds, as he had explicit permission to be in the T Building. Hunter
 17 Decl., ¶ 31. But Rohrer used this to claim that Hunter was a security threat. Esler Decl., Ex. 2
 18 (Hunter Dep. at 105:16–106:3). Once again, the FRMT investigated but found no cause for
 19 suspending or terminating Hunter from his position or remove his HUB access based on this
 20 conduct. Esler Decl., Ex. 2 (Hunter Dep. at 113:6–18); Ex. 6 (Denzer Dep. at 33:2-22; 34:3-25;
 21 35:3 – 36:12).

22 Hunter immediately reported these incidents to his counselors and the FRMT and then
 23 drafted a letter to Gilbert dated January 26, 2016 for redress of his grievances. Esler Decl.,
 24 Ex. 18 (DEFS 00894, 896, 898, 900). Hunter’s letter to Gilbert recounted that he was being
 25 harassed and targeted because of his race. Dkt. 34-1, Ex. 3. On January 29, 2016, Hunter also
 26

1 filed a racial discrimination grievance against Rohrer and McCandless through SCCC's offender
 2 grievance program. Hunter Decl. at ¶ 28, Ex. 10.

3 **E. PRISON OFFICIALS FOUND NO SUPPORT FOR ROHRER'S ACCUSATIONS
 4 AGAINST HUNTER.**

5 Hunter's counselor, Dennis Dahne ("Dahne") asked Rohrer for more information
 6 regarding his claim that Hunter was a security risk, because Dahne was unable to find any record
 7 that evidenced this conclusion. Esler Decl., Ex. 19 (DEFS 000354-355). Dahne informed
 8 Rohrer that Hunter's infraction history was good and that work evaluations were above average.
 9 *Id.* In response, Rohrer confirmed that he never documented any of Hunter's conduct that
 10 allegedly posed a security risk. Esler Decl., Ex. 19 (DEFS 000354-355).

11 Dahne also emailed Sherwood, Hunter's manager, asking for more information to find
 12 support for Rohrer's attempts to suspend and terminate Hunter. Esler Decl., Ex. 20 (DEFS
 13 000356-357). Sherwood confirmed that Rohrer and McCandless had asked Sherwood why he
 14 was only hiring Black inmates, and said that Rohrer said that Hunter was a security threat. *Id.*
 15 But neither Sherwood nor Jason Miller (the construction maintenance project supervisor who
 16 oversaw the custodial crew) had any issues with Hunter when he worked on custodial. Esler
 17 Decl., Ex. 7 (Miller Dep. at 10:25–11:7); Esler Decl., Ex. 3 (Sherwood Dep. at 104:14–105:9).
 18 In fact, both found Hunter to be a polite, good worker who did what he was told. Esler Decl.,
 19 Ex. 7 (Miller Dep. at 10:25–11:7); Esler Decl., Ex. 3 (Sherwood Dep. at 104:14–105:9).

20 **F. ROHRER CONTINUES TO RETALIATE AGAINST HUNTER FOR FILING A
 21 GRIEVANCE AGAINST HIM.**

22 Because of the constant harassment from McCandless and Rohrer, Hunter switched jobs
 23 to the CI Chair Shop on February 1, 2016. Esler Decl., Ex. 2 (Hunter Dep. at 114:5–10). In early
 24 April 2016, Rohrer approached Hunter there and told Hunter that he (Rohrer) was not happy
 25 about the grievance he wrote and that Hunter should not be working in the CI Chair Shop.
 26 Hunter Decl. at ¶ 37. Hunter ignored Rohrer, which caused his supervisor in the CI Chair Shop,
 Keith Morgan ("Morgan"), to ask him "What was that all about?" *Id.*; Esler Decl., Ex. 2 (Hunter

1 Dep. at 114:8–115:6). Hunter explained that Rohrer had been harassing him. Esler Decl., Ex. 2
 2 (Hunter Dep. at 114:8–115:21); Hunter Decl., ¶ 37. In response, Morgan told Hunter that he
 3 should not file grievances against staff, and that things would not have got as bad as they did had
 4 he not filed the grievance. Hunter Decl., ¶ 37.

5 On or about April 11, 2016, Morgan directed Hunter to report to a special visit with a
 6 DOC investigator, who was investigating Hunter’s claims. Esler Decl., Ex. 2 (Hunter Dep. at
 7 114:8–116:9); Hunter Decl., ¶ 38. Hunter told Morgan that Hunter needed to grab his lunch and
 8 take it with him because he had a special diet lunch and wasn’t going to make it back before the
 9 lunch room closed. Esler Decl., Ex. 2 (Hunter Dep. at 114:8–116:13); Hunter Decl., ¶ 38.
 10 Hunter properly obtained permission from Morgan and was personally escorted with his lunch
 11 under direct supervision by Officer Brule, a member of SCCC staff. Hunter Decl., ¶ 38; Esler
 12 Decl., Ex. 2 (Hunter Dep. at 114:8–117:16); Ex. 6 (Denzer Dep. at 33:2 – 22).

13 When Rohrer found out, Rohrer suspended Hunter for allegedly lying about having
 14 permission to bring his lunch, despite the fact that it was commonplace for offenders to take their
 15 lunch through the HUB. Esler Decl., Ex. 2 (Hunter Dep. at 114:8–118:7), Esler Decl., Ex. 21
 16 (DEFS 000746-750); Hunter Decl., ¶ 39. Before April 11, 2016, Hunter had no problems in the
 17 CI Chair Shop; in fact, Denzer noted in his email back to Rohrer that Hunter’s time cards say his
 18 work in the CI Chair Shop is superior. Esler Decl., Ex. 22 (DEFS 000340-341). Denzer later
 19 confirmed in his deposition that he found no evidence that Hunter had acted improperly in taking
 20 his lunch with him, and thought Rohrer was retaliating against Hunter. Esler Decl., Ex. 6
 21 (Denzer Dep. at 20:2 – 23:3; 34:3-25; 35:3 – 36:12).

22 On or around April 20, 2016,⁴ Hunter filed a grievance in connection with this April 11,
 23 2020 incident, reiterating Rohrer’s continuous efforts to depict him as a security threat. Hunter
 24 Decl. at ¶ 38, 41, Ex. 15. SCCC’s own investigation confirmed that Hunter had obtained the
 25

26 ⁴ This was the same day that Hunter switched back to working on Sherwood’s custodial crew. Hunter Decl., ¶ 3.

1 proper permission to take his lunch from the CI Chair Shop to his interview. Esler Decl., Ex. 6
 2 (Denzer Dep. at 20:2 – 23:3). Sherwood said he would “hire [Hunter] back in a minute,” as he
 3 always maintained that Hunter was a great worker that could be trusted. Esler Decl., Ex. 3
 4 (Sherwood Dep. at 101:3–11; 106:22–107:11).

5 When Rohrer found out that Sherwood was hiring Hunter back on the custodial crew,
 6 “the shit hit the fan,” according to Sherwood. Esler Decl., Ex. 3 (Sherwood Dep., at 104:14 –
 7 106:10). Rohrer approached Sherwood in anger asking him why he was hiring Hunter back on
 8 his crew. Esler Decl., Ex. 3 (Sherwood Dep. at 105:10–19). He accused Sherwood of not being
 9 “blue,” meaning Sherwood was not backing up his fellow officers. *Id.* at 105:10–106:2. He also
 10 sent an email to Sherwood, Denzer, and others making untrue claims about Hunter (i.e., that
 11 Hunter was continuously lying to staff, having issues with his current supervisor, leaving the
 12 HUB with contraband, etc.) in his ongoing attempts to frame Hunter as a security threat. Esler
 13 Decl., Ex. 23 (DEFS 000358-359). In response to Rohrer’s email, Idso informed Rohrer that
 14 Hunter’s OMNI records show no infractions related to his HUB employment and that there were
 15 no behavior log entries that raised concern. *Id.*, Esler Decl., Ex. 24 (DEFS 002149-2150).

16 **G. HUNTER’S GRIEVANCES COULD NOT BE HANDLED BY THE GRIEVANCE
 17 COORDINATOR AND WERE SENT DIRECTLY TO SUPERINTENDENT
 18 GILBERT FOR RESOLUTION, BUT GILBERT NEVER INFORMED HUNTER
 19 OF THE OUTCOME.**

20 Hunter filed his grievances with the grievance coordinator, Dahne. *See* Hunter Decl.,
 21 ¶¶ 28, 38, 41; Exs. 10, 15. Dahne informed Hunter that he was not authorized to investigate
 22 other staff members. Esler Decl., Ex. 2 (Hunter Dep. at 157:3–25). Per SCCC’s grievance
 23 policy, grievances filed related to employee conduct are to be sent directly to the superintendent
 24 for review and investigation as a Level II grievance. Esler Decl., Ex. 25, p. 17 (DEFS 000001–
 25 33). Hunter also filed a grievance directly with Superintendent Gilbert. Dkt. 34-1, Ex. 3, at 10–
 26 13. When Gilbert finally responded to Hunter over two months later on April 12, 2016, she
 informed Hunter that she would be investigating his claims further. Esler Decl., Ex. 9 (DEFS

1 000307). Hunter informed Dahne of her intent to investigate, and as a result, Hunter's
 2 grievances would be handled by Gilbert, in line with SCCC policy. Esler Decl., Ex. 2 (Hunter
 3 Dep. at 157:9–158:7); Esler Decl., Ex. 26 (DEFS 000339).

4 Hunter cooperated in the investigation taken on by Gilbert and patiently awaited the
 5 results. Esler Decl., Ex. 2 (Hunter Dep. at 158:8–17). After Hunter failed to receive any
 6 information regarding the status of his grievance, he informed Dahne that he (Hunter) had not
 7 heard anything. *Id.* Dahne told Hunter there was nothing he could do but wait. *Id.* at 158:8–19.

8 Hunter continued to wait and still failed to receive any information regarding the
 9 investigation so he approached Dahne a second time. *Id.* at 158:8–22. Hunter specifically asked
 10 whether he could appeal the grievances to the next level. *Id.* at 158:8–24. Dahne again told
 11 Hunter “there is nothing you can do.” *Id.* Dahne also informed Hunter that the matters were
 12 now out of his hands. *Id.* at 158:8–159:3. Hunter also attempted to contact Gilbert, but Gilbert
 13 failed to respond. *Id.* at 158:8–159:23. Gilbert's team never provided their investigation
 14 findings to Hunter. Esler Decl., Ex. 2 (Hunter Dep. at 158:8–160:4). In fact, Hunter did not
 15 receive the findings or results from Gilbert's investigation until the State produced discovery in
 16 this case. *Id.* at 158:8–161:10.

17 **H. PROCEDURAL BACKGROUND**

18 Hunter filed his initial complaint pro se on about May 1, 2018. Dkt. 3. The State moved
 19 for summary judgment on all claims (without arguing that Hunter had failed to exhaust his
 20 grievances) on about February 25, 2019. Dkt. 28. Magistrate Judge Creatura issued a Report
 21 and Recommendation on April 24, 2019 that recommended granting the State's motion for
 22 summary judgment. Dkt. 42. On June 28, 2019, Judge Settle issued an Order noting possible
 23 questions of fact regarding whether the custodial crew was the only crew with regular and
 24 predictable access to the EFV units, as well whether there was selective enforcement of
 25 regulations, and asked whether Hunter might benefit from appointment of pro bono counsel.
 26 Dkt. 45. After hearing back from Hunter, the Court entered an order on October 2, 2019

1 appointing Nick Valera⁵ of the law firm Miller Nash Graham & Dunn, LLP as pro bono counsel
 2 for Mr. Hunter. Dkt. 51.

3 The Court thereafter declined to adopt the Report and Recommendations, denied the
 4 State's motion for summary judgment without prejudice, and allowed the parties to conduct
 5 further discovery. Dkt. 55. No trial date has been set. Plaintiff Darrick Hunter is scheduled to
 6 be released from prison in June of this year. Hunter Decl., ¶ 1.

7 **III. ARGUMENT AND AUTHORITIES**

8 **A. SUMMARY JUDGMENT STANDARD**

9 Summary judgment is appropriate if no genuine dispute of material fact exists and the
 10 moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a). Where reasonable
 11 minds could differ, summary judgment is not appropriate. *See v. Durang*, 711 F.2d 141, 143 (9th
 12 Cir. 1983). Courts view the evidence in the light most favorable to the non-moving party and
 13 draw all reasonable inferences in the non-movant's favor. *Clicks Billiards Inc. v. Sixshooters*
 14 *Inc.*, 251 F.3d 1252, 1257 (9th Cir. 2001). However, the District Court must decide the
 15 exhaustion issue itself, even when facts are disputed. *Albino*, 747 F.3d at 1170 – 1171.

16 **B. HUNTER EXHAUSTED HIS CLAIMS THROUGH THE REMEDIES MADE
 17 AVAILABLE TO HIM.**

18 The Prison Litigation Reform Act (“PLRA”) requires that prisoners exhaust available
 19 administrative remedies before bringing an action in court. *Jones v. Bock*, 549 U.S. 199, 211
 20 (2007). However, this “exhaustion requirement hinges on the ‘availab[ility]’ of administrative
 21 remedies. . . .” *Ross v. Blake*, 136 S. Ct. 1850, 1858 (2016). Defendants have the burden to prove
 22 a failure to exhaust. *Albino v. Baca*, 747 F.3d 1162, 1166 (9th Cir. 2014) (en banc).⁶ Defendants

23

24

25 ⁵ Mr. Valera is on leave from his law firm to attend Judge Advocate General training; Mr. Esler is covering for Mr.
 26 Valera in Mr. Valera's absence. Esler Decl., ¶ 1.

26 ⁶ Defendants did not argue exhaustion in their previous summary judgment motion. Dkt. 28.

1 acknowledge that Hunter properly exhausted all remedies regarding the strip search claims, but
 2 argue that is not so for his other claims.⁷ Defendants' Renewed Motion, at 8.

3 Hunter exhausted all his "available" remedies. An administrative remedy is unavailable
 4 when, despite what regulations or guidance materials may promise, it operates as a simple dead
 5 end and officers are unable or consistently unwilling to provide any relief to aggrieved inmates.
 6 *Ross*, 136 S. Ct. at 1859; *Id.* An administrative remedy is also unavailable when it is so opaque
 7 that it becomes, practically speaking, incapable of use. *Id.* Further, "exhaustion is not required
 8 when prison administrators thwart inmates from taking advantage of a grievance process through
 9 machination, misrepresentation, or intimidation." *Id.* at 1860; *accord Albino*, 747 F.3d at 1177
 10 (prisoner exhausted available remedies because jail officials misrepresented process). A
 11 prisoner's grievance only has to put prison officials on notice of the general nature of the claims.
 12 *Griffin*, 557 F.3d at 1120.

13 SCCC's grievance coordinator, Dahne, told Hunter that Dahne was not authorized to
 14 investigate employee conduct. Esler Decl., Ex. 2 (Hunter Dep. at 157:3 – 25). SCCC's grievance
 15 policy requires the superintendent to handle such grievances as Level II grievances. Esler Decl.,
 16 Ex. 25 (DEFS 000001-33). Superintendent Gilbert did open an investigation.

17 On about May 3, 2016, Dahne met with Hunter about his grievances and Hunter
 18 acknowledged that Gilbert was investigating his claims. Dkt. 77-6 at 2, 77-8, at 2; Esler Decl.,
 19 Ex. 2 (Hunter Dep. at 157:3–158:7). Hunter understood that Gilbert would take over and
 20 investigate both the retaliation and racial discrimination claims that Dahne claimed he was
 21 unauthorized to handle. Esler Decl., Ex. 2 (Hunter Dep. at 157:9–158:7); Esler Decl., Ex. 26
 22 (DEFS 000339). Taking the facts in the light most favorable to Hunter, the "acceptable
 23 resolution" referenced in Dahne's Level I response (Dkt. 77-6 at 2, 77-8, at 2) was Gilbert's
 24

25 _____
 26 ⁷ Hunter did not file any retaliation grievance against McCandless. Dkt. 77-8, at 139. Hunter's retaliation claim is
 against Rohrer alone for retaliating against Hunter for filing a grievance against Rorher.

1 ongoing investigation, which Hunter reasonably believed included all his claims relating to
 2 discrimination and retaliation.

3 Despite inquiring numerous times thereafter about the status of Gilbert's investigation,
 4 Hunter was never told the results of that investigation until they were produced in discovery in
 5 this case. When prison officials do not respond to a prisoner's initial grievance, administrative
 6 remedies are exhausted. *Dole v. Chandler*, 438 F.3d 804, 809, 811 (7th Cir. 2006); *accord Sapp*
 7 *v. Kimbrell*, 623 F.3d 813, 822-823 (9th Cir. 2010) (approving of *Dole*'s holding). Dahne assured
 8 Hunter numerous times that Hunter had done all he needed to do and that "there were no further
 9 avenues for appeal" (Hunter Decl., ¶ 47); even if Dahne was wrong, that still results in
 10 exhaustion. *Ross*, 136 S.Ct. at 1859; *Albino*, 747 F.3d at 1177. Hunter exhausted his "available"
 11 administrative remedies.⁸

12 **C. GENUINE ISSUES OF MATERIAL FACT EXIST AS TO WHETHER
 13 DEFENDANTS VIOLATED HUNTER'S EQUAL PROTECTION RIGHTS.**

14 "The Equal Protection Clause requires the State to treat all similarly situated people
 15 equally." *Shakur v. Schriro*, 514 F.3d 878, 891 (9th Cir. 2008). Even in the prison environment,
 16 courts apply strict scrutiny to claims of race-based discrimination. *Johnson v. California*, 543
 17 U.S. 499, 505-506 (2005). That scrutiny "requires the government to prove that the [challenged]
 18 measures are narrowly tailored to further a compelling government interest." *Harrington v.*
Scribner, 785 F.3d 1299, 1306 (9th Cir. 2015).

19 When a plaintiff alleges race-based discrimination, intentional discrimination means that
 20 a defendant acted at least in part because of the plaintiff's race. *Harrington v. Scribner*, 785 F.3d
 21 1299, 1305 (9th Cir. 2015).^v In the equal protection context, a plaintiff does not need to prove
 22 discriminatory intent by direct evidence. *Lowe v. City of Monrovia*, 775 F.2d 998, 1011 (9th Cir.
 23

24 ⁸ Admittedly, Hunter did not grieve the incidents when he was singled out for having fingerless gloves (even though
 25 white workers used the same fingerless gloves), or where his all-Black crew had their sunglasses confiscated even
 though other crews continued to use similar glasses, or the fact that his crew alone had to wear safety vests in the
 26 HUB. Hunter Decl., ¶¶ 44-45; *accord* Harris Decl., ¶ 10; Tremble Decl., ¶ 11. However, those incidents should be
 considered as further evidence of Rohrer's and McCandless's animus toward, and disparate treatment of, Hunter and
 his black crewmates, as well as further evidence of Rohrer's retaliation against Hunter.

1 1985), *as amended*, 784 F.2d 1407 (9th Cir. 1986). Where the challenged policy is “facially
 2 neutral,” proof of its “disproportionate impact on an identifiable group can satisfy the intent
 3 requirement” if it “tends to show that some invidious or discriminatory purpose underlies the
 4 policy.” *Lee v. City of Los Angeles*, 250 F.3d 668, 686 (9th Cir. 2001). A plaintiff’s “burden to
 5 raise a triable issue of pretext is hardly an onerous one.” *Earl v. Nielsen Media Research, Inc.*,
 6 658 F.3d 1108, 1113 (9th Cir. 2011) (internal citations and quotation marks omitted). Further,
 7 the Ninth Circuit has “repeatedly held that it should not take much for a plaintiff in a
 8 discrimination case to overcome a summary judgment motion.” *France v. Johnson*, 795 F.3d
 9 1170, 1175 (9th Cir. 2015). “This is because the ultimate question is one that can only be
 10 resolved through a searching inquiry—one that is most appropriately conducted by a factfinder,
 11 upon a full record.” *Chuang v. Univ. of Cal. Davis, Bd. of Trustees*, 225 F.3d 1115, 1124 (9th
 12 Cir. 2000).

13 1. Rohrer Instituted a Policy of Strip Searching the Only All-Black Crew Even
 14 Though Other Crews Had Equal or Greater Access to EFVs.

15 Defendants do not seem to dispute that (1) the alleged problem of custodial crews
 16 smuggling in contraband occurred prior to Sherwood becoming custodial supervisor in July 2014
 17 and (2) at the time (i.e., July 2014), no black inmates were working in the HUB. Rohrer did not
 18 implement the custodial crew strip search policy until November 4, 2014 (Dkt. 31-1, at 4) – a
 19 little over two weeks after Sherwood hired another black inmate to work on his custodial crew,
 20 and seemingly many months after the previous problem with contraband ended. Esler Decl., Ex.
 21 10 (Sherwood Dep., Ex. 3).

22 Defendants argue that the custodial crew was unique because no other crew had similar
 23 access to the EFVs. However, the State’s own records show that multiple other facility
 24 maintenance crews entered the EFVs regularly and sometimes more often than the custodial
 25 crew. Dkt. 75, Ex. 1. Those records do not reflect all the work done at EFVs, and indeed exclude
 26

1 “day to day sanitation or garbage pickup or other automatic tasks.” Dkt. 75, at 2, ¶ 6. The State
 2 admits that preventative maintenance on EFVs occurs on “regular intervals.” Dkt. 75, at 2, ¶ 4.

3 While the custodial crew entered the EFVs 60 times between the years of 2014 and
 4 2016,⁹ the construction maintenance crew entered the EFV Units 95 times during the same
 5 period. Esler Decl., Ex. 27 (DEFS 002896-2994); Hunter Decl. at ¶¶ 8, 20–21, Ex. 1.
 6 Construction maintenance entered the EFVs more often than custodial because, aside from
 7 entering the EFVs in response to a work order, they were responsible for a number of *regular*
 8 EFV inspections, including monthly inspections of fire extinguishers and first aid kits and
 9 quarterly inspections of the heat system. *Id.* at ¶¶ 7, 8, Ex. 1. Additionally, plumbing entered the
 10 EFV Units 50 times during that same period. *Id.* at ¶ 8, Ex. 1; ¶¶ 20–21.

11 Defendants state “predictability is a necessary prerequisite to the introduction of
 12 contraband.” Renewed Motion at 13, ln. 19. But as shown by the State’s own records, the
 13 construction crew also had predictable monthly inspection obligations. Hunter Decl. at ¶ 8, Ex. 1
 14 (evidencing monthly, routine first aid kit checks and fire extinguisher checks). Moreover, given
 15 that the previous custodial crew member had already been caught introducing contraband (before
 16 Sherwood became supervisor), it would become more likely that other crews would be used for
 17 that purpose in the future.

18 Construction maintenance (among others) had the same routine access as custodial to the
 19 EFV Units and posed the same security risks as the custodial crew, but there was one principal
 20 difference between custodial and construction maintenance – the custodial crew was all-Black
 21 While the crews were similarly-situated, only Hunter and his Black crewmates were strip
 22 searched upon leaving the EFV Units. Thus, Hunter’s equal protection claim should stand.

23

24

25

⁹ The strip search logs (Dkt. 76-1, Ex. 1) do not seem to show 60 such strip searches, again demonstrating that they are incomplete. *See also* Esler Decl., Ex. 3 (Sherwood Dep. at 129:20 – 131:18); Ex. 28 (Sherwood Dep., Ex. 11).

1 2. Hunter Can Show that the Development and Implementation of the Custodial
 2 Crew Strip Searches were a Pretext for Racial Discrimination.

3 On summary judgment, an equal protection plaintiff may show pretext by creating a
 4 triable issue of fact that either: (1) the proffered basis was objectively false; or (2) the Defendant
 5 actually acted based on an improper motive. *Patel v Penman*, 103 F.3d 868, 876 (9th Cir. 1996).
 6 The Defendants argue that they put the policy in place to remove security vulnerabilities that
 7 were unique to the custodial team. Renewed Motion at 16:13–21. However, if Defendants
 8 wanted to remove security vulnerabilities, they would have implemented the policy against all
 9 inmates who accessed the EFV units. Idso actually requested that type of policy, but defendant
 10 Rohrer instead took it upon himself to order strip searches of only the all-Black custodial crew.
 11 Compare Hunter Decl., Ex. 3 with Ex. 4.

12 As evidenced by Idso’s initial email to Rohrer, the goal to eliminate the introduction of
 13 contraband was to be achieved through strip searches of any facility maintenance crew member
 14 (“porter”) who worked in the EFV Units and left the direct line of sight of a supervisor. Hunter
 15 Decl. at ¶ 10, Ex. 3. This description encompasses crews other than just Hunter’s custodial crew.
 16 Indeed, Captain Manio confirms that over the course of his nearly 20 year career at SCCC, “the
 17 EFV units have historically been an avenue by which incarcerated individuals introduce
 18 contraband into” SCCC. Dkt. 73, ¶ 6. Yet defendants did not introduce a strip search policy at
 19 all until shortly after Sherwood started hiring black custodial workers in the HUB for the first
 20 time; defendant Rohrer implemented that policy so that only the all-Black custodial crew would
 21 be strip searched. That remarkable coincidence should be sufficient alone to allow Hunter’s
 22 claims to go to the jury.

23 Rohrer was aware that the custodial crew was made up of all Black offenders, as
 24 evidenced by his questions to Sherwood asking “why are you hiring all these black guys?” Esler
 25 Decl., Ex. 3 (Sherwood Dep. at 58:15–19). Rohrer developed the strip search policy after
 26 Sherwood hired his third black inmate to work on the custodial crew. Rohrer’s comments as

1 well as later conduct toward Hunter, including telling Hunter that Rohrer did not want Hunter's
 2 "black ass" working in the HUB (Hunter Decl., ¶ 27), are evidence of his racial animus.
 3 *Serrano*, 545 F.3d at 1082-1083. A question of material fact exists as to whether Rohrer's strip
 4 search was a pretext for racial discrimination.

5 **D. A GENUINE ISSUE OF MATERIAL FACT EXISTS WHETHER THE STRIP
 6 SEARCHES VIOLATE HUNTER'S FOURTH AMENDMENT RIGHTS.**

7 In *Bell v. Wolfish*, 441 U.S. 520, 558, 99 S.Ct. 1861, 1884, 60 L.Ed.2d 447 (1979), the
 8 Supreme Court set forth a balancing test for determining a strip search's reasonableness:

9 "The test of reasonableness under the Fourth Amendment is not capable of precise
 10 definition or mechanical application. In each case it requires a balancing of the need
 11 for the particular search against the invasion of personal rights that the search
 12 entails. Courts must consider the scope of the particular intrusion, the manner in
 13 which it is conducted, the justification for initiating it, and the place in which it is
 14 conducted."

15 *Id.* at 559, 99 S.Ct. at 1884.

16 The strip searches carried out against Hunter and his custodial team members were
 17 invasive strip searches that required the exposure of their genitals to SCCC staff. Esler Decl.,
 18 Ex. 14, § G (DEFS 000057-62). Further, these searches violated SCCC policy. SCCC had a
 19 designated area at the HUB where inmates pass through to come back into the institution when
 20 they have been out at the EFVs; by SCCC policy, this was the designated location at SCCC for
 21 inmates to be strip searched. Esler Decl., Ex. 4 (Gilbert Dep. at 56:24–58:8); Hunter Decl., Ex. 5.
 22 In violation of this policy, Hunter and his crew were strip searched inside the EFV Units. Esler
 23 Decl., Ex. 2 (Hunter Dep. at 8:18–9:13). The strip searches were also not documented properly.
 24 Per SCCC policy, all strip search records must include at a minimum the date of the search, the
 25 name of the offender, the offenders DOC number, the reason for the search, and the names and
 26 genders of employees conducting the search. Esler Decl., Ex. 14, § D (DEFS 000057-62). It is
 apparent that many strip searches are missing. Esler Decl., Ex. 3 (Sherwood Dep.; at 129:20 –
 131:18); Ex. 5 (Rohrer Dep. at 197:2–198:7); Hunter Decl., ¶¶ 16-17. Sherwood also reported
 that in many cases SCCC staff were not logging the strip searches of his custodial crew at all.

1 Esler Decl., Ex. 3 (Sherwood Dep. at 127:1–4). Indeed, the logs submitted seem only to show
 2 Hunter being strip searched three times (on April 2, 2015, September 3, 2015, and September 30,
 3 2015). Dkt. 76, Ex. 1. Hunter testifies that he was subjected to 25 or more strip searches.
 4 Hunter Decl., ¶¶ 16-17.

5 Courts have held that when determining the reasonableness of strip searches, the presence
 6 or absence of ready alternatives should be considered. *Michenfelder v. Sumner*, 860 F.2d 328,
 7 333 (9th Cir. 1988). Here, SCCC has allegedly been experiencing contraband smuggling
 8 through the EFVs for 20 years and had dealt with that problem without automatic strip searches
 9 (Dkt. 73, ¶ 6); shortly after the first Black workers are hired in the HUB area, SCCC suddenly
 10 implements a strip search policy of only that Black crew. A genuine issue of material fact exists
 11 as to whether the searches implemented were reasonable under the Fourth Amendment.

12 **E. HUNTER’S RETALIATION CLAIMS ARE SUFFICIENT AND SUPPORTED.**

13 To prevail on a retaliation claim, a plaintiff must show that his protected conduct was
 14 “the ‘substantial’ or ‘motivating’ factor” behind the Defendant’s conduct. *Brodheim v. Cry*, 548
 15 F.3d 1262, 1271 (9th Cir. 2009) (quoting *Soranno’s Gasco, Inc. v Morgan*, 874 F.2d 1310, 1314
 16 (9th Cir. 1989). “Within the prison context, a viable claim of First Amendment retaliation entails
 17 five basic elements: (1) An assertion that a state actor took some adverse action against an
 18 inmate (2) because of (3) that prisoner’s protected conduct, and that such action (4) chilled the
 19 inmate’s exercise of his First Amendment rights, and (5) the action did not reasonably advance a
 20 legitimate correctional goal.” *Rhodes v. Robinson*, 408 F.3d 559, 567–68 (9th Cir. 2005). Courts
 21 can consider the timing of the actions in determining retaliatory intent. *Watison v. Carter*, 668
 22 F.3d 1108, 1114 (9th Cir. 2012).

23 In addition to the false claims Rohrer made against Hunter, the multiple suspensions
 24 Rohrer caused, and Rohrer’s constant attempts at having Hunter terminated *after* Hunter told
 25 Rohrer he was going to file a grievance against him and sue him, Rohrer also specifically told
 26 Hunter that he was not happy about the grievance he wrote and that he should not be working in

1 the CI Chair Shop. Hunter Decl. at ¶ 37. Additionally, when Hunter informed the chair shop
 2 supervisor, Morgan, that Rohrer was giving him a hard time because he filed a grievance against
 3 him, Morgan told Hunter that he should not file grievances against staff and that things would
 4 not have been as bad as they were for him had he not filed the grievance. Esler Decl., Ex. 2
 5 (Hunter Dep. at 114:8–115:21). Even the grievance coordinator, Dahne, told Hunter that Rohrer
 6 was not happy about the grievance Hunter had filed against him. *Id.* at 154:25–155:13.

7 Because there is additional evidence that demonstrates that Rohrer's conduct was
 8 retaliatory, a genuine issue of material fact exists and Hunter's claim should stand.¹⁰

9 **F. DEFENDANTS ARE NOT ENTITLED TO QUALIFIED IMMUNITY BECAUSE
 10 THEY COULD NOT HAVE REASONABLY BELIEVED THAT THEIR
 ACTIONS WERE LAWFUL.**

11 The right to be free from racial discrimination, even in the penological setting, has been
 12 clear for over a decade, if not longer. *Johnson v. California*, 543 U.S. 499, 512, 125 S.Ct. 1141,
 13 1150, 160 L.Ed.2d 949 (2005); *accord Harrington v. Scribner*, 785 F.3d 1299, 1305 (9th Cir.
 14 2015). Similarly, prisoners clearly have the right to file grievances and to be free from
 15 retaliation for doing so. *Watison v. Carter*, 668 F.3d 1108, 1114 (9th Cir. 2012). Hunter has
 16 shown sufficient facts that, when taken in the light most favorable to him, show violation of his
 17 clearly established constitutional rights. *Saucier v. Katz*, 533 U.S. 194, 201 (2001). Defendants
 18 are not entitled to qualified immunity.

19 **IV. CONCLUSION**

20 Hunter agrees that his Eighth Amendment and Due Process claims may be dismissed, and
 21 that he is not claiming retaliation against defendant McCandless. Otherwise, the remainder of
 22 his claims should proceed to a trial by jury.

23 ///

24 ///

25

26 ¹⁰ Plaintiff agrees that his Eighth Amendment and Due Process claims should not proceed.

1 DATED this 15th day of March, 2021.
2

3 /s/ Brian W. Esler
4

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CERTIFICATE OF SERVICE

I hereby certify that on the date below, I served via email the foregoing document to the following:

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I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 15th day of March, at Seattle, Washington.

/s/ Brian W. Esler
Brian W. Esler